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EX PARTE OR LATE FILED

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July 17, 1998

VIA HAND DELIVERY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

RECEIVED

JUL 17 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: PR Docket No. 89-552 /
220 MHz Auction
EX PARTE LETTER

Dear Ms. Salas:

On behalf of Petroleum Communications, Inc. ("PetroCom"), we are responding to the May 5, 1998 letter submitted by Shell Offshore Services Company ("SOSCO") in the above referenced docket. Contrary to SOSCO's contentions, the Commission on its own motion cannot include the GOM as a geographic area in the 220-222 MHz auction without violating the "notice and comment" requirements of the Administrative Procedure Act ("APA").¹ Further, the Commission has already initiated a rulemaking concerning the licensing of other commercial mobile radio services ("CMRS") in the GOM.² Therefore, any proposal to subject the GOM to competitive bidding in the 220-222 MHz band would be properly addressed in that proceeding.

On February 19, 1997, the Commission released a Third Report & Order and Fifth Notice of Proposed Rulemaking.³ In the Third Report and Order, the Commission adopted rules to

¹ SOSCO letter to Jonathan Cimko at 5-7 (dated May 5, 1998); 5 U.S.C. § 553.

² In the Matter of Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, WT Docket No. 97-112, CC Docket No. 90-6, Second Further Notice of Proposed Rulemaking, 12 FCC Rcd 4576 (1997) [hereinafter GOM Rulemaking].

³ Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Third Report and Order; Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943 (1997) [hereinafter Third Report & Order, Fifth NPRM].

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govern the future operation and licensing of the 220-222 MHz service. Under the new licensing scheme, geographic areas subject to competitive bidding were broken down into Economic Areas ("EAs"), Regional Economic Area Groupings ("REAGs") and nationwide licenses.⁴ The Commission neither proposed that the GOM be designated for competitive bidding nor adopted rules to define the GOM as such.⁵ SOSCO failed to file comments in this proceeding.⁶ Subsequently, parties other than SOSCO filed petitions for reconsideration to specific rules adopted in the Third Report & Order. The petitioners' challenges, which were totally unrelated to the geographic areas subject to competitive bidding, were addressed by the Commission in the MO&O released on May 21, 1998.⁷

The Commission's Rules defining the geographic areas for the 220-222 MHz auction are final. No timely challenge to the areas defined for geographic licensing was filed following the release of the Third Report & Order. The challenges that were filed dealt with the rules adopted for interference protection criteria, construction requirements, and operating and technical standards. These challenges were addressed by the Commission in the MO&O on May 21, 1998. Therefore, the Commission cannot on its own motion include the GOM in the auction without running afoul of the Commission's rulemaking procedures and the "notice and comment" requirements of the APA.⁸ SOSCO's assertion that the Commission can include the GOM in the auction on its own motion is erroneous.

The APA requires that an agency provide the public with notice of "the terms or substance of the proposed rule" and an opportunity for interested persons to participate in the rulemaking.⁹

⁴ Id. at 10948-49.

⁵ Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Second Memorandum Opinion and Order; Third Notice of Proposed Rulemaking, 11 FCC Rcd 188 (1995) [hereinafter Third NPRM].

⁶ See Third Report & Order, 12 FCC Rcd at 11155. As for the Fifth NPRM, the proposed rules are unrelated to the geographic areas designated for auction. Id. at 11076-89.

⁷ Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Memorandum Opinion and Order on Reconsideration, 1998 FCC Lexis 2460, *18-*174 ¶¶ 15-166 (May 21, 1998) [hereinafter MO&O].

⁸ 5 U.S.C. § 553; 47 C.F.R. §§ 1.411-1.429.

⁹ 5 U.S.C. § 553(b)-(c).

SOSCO argues that the Third NPRM provided sufficient notice for the Commission to include the GOM in the auction, because it is a "logical outgrowth" of the proposed rules.¹⁰ However, SOSCO fails to note that the geographic licensing rules were adopted in the Third Report & Order, were not challenged, and are therefore final.¹¹ Redefining the geographic areas for licensing is too far removed from the issues noticed in the petitions for reconsideration of the Third Report & Order.¹² Thus, the Commission cannot include the GOM in the auction as a "logical outgrowth" of the petitions for reconsideration.¹³ Further, the petitions for reconsideration have since been addressed by the Commission, thereby foreclosing any opportunity to designate the GOM for auction without providing for notice and comment.¹⁴ Finally, SOSCO's May 5, 1998 letter, requesting that the Commission include the GOM in the auction, amounts to an untimely filed petition for reconsideration.¹⁵

In addition, the Commission has already initiated a rulemaking requesting comments on licensing possibilities for other CMRS services in the GOM.¹⁶ Surprisingly, SOSCO did not mention the GOM Rulemaking in its May 5 letter to the Commission's staff.¹⁷ Considering, that the Commission has decided to deal with future CMRS licensing in the GOM in another rulemaking, SOSCO's proposal for 220-222 MHz licensing in the GOM should be addressed in that proceeding.

¹⁰ SOSCO letter at 5 (citation omitted).

¹¹ AT&T Corp. v. FCC, 113 F.3d 225, 229 (D.C. Cir. 1997); Jerome Thomas Lamprecht, 7 FCC Rcd 6794 (1992); In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion & Order, 102 FCC 2d 849, 862 (1985).

¹² Public Service Commission of the District of Columbia v. FCC, 906 F.2d 713, 717 (D.C. Cir. 1990).

¹³ United Steelworkers v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980).

¹⁴ MO&O, 1998 FCC Lexis 2460 (May 21, 1998).

¹⁵ Federation of American Health Systems, 12 FCC Rcd 2668, 2669-70 (1997); In the Matter of Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Eighth Report and Order, 11 FCC Rcd 1463, 1533 (1995); Association of College and University Telecomms Adm'r, 8 FCC Rcd 1781, 1782 (1993).

¹⁶ GOM Rulemaking, 12 FCC Rcd at 4599-4600 ¶¶ 58-63.

¹⁷ See SOSCO letter (filed May 5, 1998).

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The rules governing the geographic licensing scheme have been adopted and are final. The Commission cannot make substantive changes to them without providing for notice and comment. Any proposal to license the 220-222 MHz band in the GOM should be addressed in the GOM rulemaking.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. S. Myers", with a long horizontal flourish extending to the right.

Richard S. Myers

cc: John Cimko
Wayne V. Black